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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

PROGRESSIVE CELLULAR III B-3,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS W. HAROLD, JR.
5413 Main Street
Stephens City, Virginia 22655
(703) 869-0040

Counsel of Record

July, 1993

QUESTIONS PRESENTED

1. Whether a federal administrative agency may refuse to consider facts and evidence presented to it when determining if an applicant for an agency authorization has violated the agency's rules.

2. Whether a federal administrative agency may refuse to consider legal arguments presented to it by an applicant for an agency license intended to demonstrate that the agency's rules had not been violated.

3. Whether the refusal of a federal administrative agency to consider a license applicant's evidence and legal argumentation tending to establish that the agency's rules had not been violated by that applicant constitutes a denial of the applicant's rights under the Due Process Clause of the U.S. Constitution.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the proceeding before the Court of Appeals for the District of Columbia Circuit are as follows:

Petitioner

1. Progressive Cellular III B-3

Respondents

1. Federal Communications Commission
2. The United States of America

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF ALL PARTIES TO THE PROCEEDING..ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.....3

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE WRIT:

I. FACTUAL BACKGROUND.....9

II. THE FCC'S REFUSAL TO CONSIDER LEGAL ARGUMENTATION AND EVIDENCE PRESENTED BY PETITIONER CONSTITUTED A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.....15

III. THE FCC HAS VIOLATED ESTABLISHED STANDARDS GOVERNING AN AGENCY'S ACTIONS.....25

IV. THE COURT OF APPEALS HAS FAILED TO ENFORCE ITS POLICIES GOVERNING ACTIONS OF ADMINISTRATIVE AGENCIES.....29

TABLE OF CONTENTS - CONTINUED

V. THE FCC MISCONSTRUED PETITIONER'S ARGUMENTS AND ADVANCED'S PARTNERSHIP AGREEMENT.....33

CONCLUSION.....38

TABLE OF AUTHORITIES

CASES: PAGE

Arkansas v. Oklahoma, 503 U.S. ____, 112 S Ct 1046 (1992).....27

Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937).....24

Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973).....31

Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990).....37

Kessler v. Strecker, 307 U.S. 22 (1939).....22

Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).....26

New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).....24

Pierce v. Underwood, 487 U.S. 552 (1988).....25

TABLE OF AUTHORITIES-CONTINUED

CASES (cont.): PAGE

Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938), cert. denied, 305 U.S. 613 (1938).....29,30,31

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943).....22

United States v. First City National Bank, 386 U.S. 361 (1967).....26

FEDERAL STATUTES:

47 U.S.C. §402(b)(1).....5

47 U.S.C. §402(j).....3

28 U.S.C. §1254.....3

FEDERAL REGULATIONS:

47 C.F.R. 22.921(b).....4,8 11,15

STATE STATUTES:

Alabama Partnership Act, Chapter 8, Code of Alabama.....5

Alabama Partnership Act

§10-8-49(a).....16

§10-8-49(d).....16

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on

February 2, 1993, a petition for rehearing or, in the alternative, suggestion for rehearing en banc having been denied by orders of the court of appeals on April 7, 1993.

OPINIONS BELOW

A copy of the judgment of the court of appeals appears in the Appendix hereto at 1a. The Memorandum Opinion and Order of the Federal Communications Commission, from which Petitioner took its appeal to the court of appeals, appears in the Appendix hereto at 9a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was filed on February 2, 1993, and orders denying Petitioner's petition for rehearing or, in the alternative, suggestion for a rehearing en banc were

filed on April 7, 1993. This petition for a writ of certiorari was filed within ninety days of that date. Copies of the orders of the court of appeals appear in the Appendix at 5a and 7a. This Court's jurisdiction is invoked under 47 U.S.C. §402(j) and 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

47 CFR 22.921: Ownership in applications for cellular service for markets below the top 90.

(b) Markets beyond the top 120 and Rural Service Areas - (1) General. Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA or NECMA market, except that interests of less than one percent will not be considered. For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. No party to a wireline

application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

Alabama Partnership Act, Chapter 8, Code of Alabama. See excerpts, Appendix at 19a-21a.

STATEMENT OF THE CASE

This case was heard by the U.S. Court of Appeals for the District of Columbia Circuit on Petitioner's appeal from an adverse decision of the Federal Communications Commission, pursuant to 47 U.S.C. §402(b)(1).

Petitioner, a Pennsylvania general partnership, filed with the Federal Communications Commission ("FCC") in October of 1988 the requisite $200 filing fee and an accompanying application

seeking authorization to construct and operate a non-wireline cellular telephone communications system in the northeast portion of the State of Oklahoma referred to by the FCC as the Oklahoma 4-Nowata Rural Service Area ("RSA"). Petitioner's application was one of several hundred competing applications filed for that authorization, only one of which would be selected subsequently by the FCC at a random selection or lottery proceeding. On August 9, 1989 Petitioner's application was selected at the lottery conducted by the FCC.

After the lottery selection, the FCC was informed by a competing applicant that the names of two of Petitioner's partners, Jack Thomas and Dennis Thomas, both residents of Pennsylvania, were listed in the application filed for the Oklahoma 4-

Nowata RSA authorization by another applicant, Rubana Cellular Company South Central ("Rubana"), an Alabama general partnership.

Petitioner produced facts and evidence, including affidavit testimony, establishing that the Thomases were neither informed nor knew that their names were to be listed as participants in Rubana's application. Petitioner also presented legal argumentation to the FCC establishing that, under Alabama law and general principles of partnership law, the action of Rubana's managing partner in listing the Thomases as participants in Rubana's application was insufficient to cause them legally to be participants or to have any ownership interest in Rubana's application.

The FCC refused to consider the

facts, evidence and legal argumentation presented by Petitioner tending to establish that no rule violation had occurred. Instead, it dismissed Petitioner's application for an alleged violation of FCC Rule §22.921(b) (47 CFR 22.921(b)) which, in pertinent part, prohibits any party to a non-wireline cellular application from having any ownership interest in more than one application for the same Rural Service Area.

The Court of Appeals for the District of Columbia Circuit entered its judgment affirming the FCC's dismissal of Petitioner's application. Petitioner's petition for rehearing or, in the alternative, suggestion for rehearing en banc having been denied by Orders of the court of appeals, Petitioner's application

still remains dismissed.

REASONS FOR GRANTING THE WRIT

I. FACTUAL BACKGROUND.

In 1985, before the FCC formulated its policies governing the award of non-wireline cellular authorizations for the RSA markets, Milton Vaughn, a resident of Alabama, formed an Alabama general partnership named Advanced Cellular Company ("Advanced"), which Jack and Dennis Thomas joined in September of 1985. Advanced thereafter filed cellular applications with the FCC for a variety of different Metropolitan Statistical Area ("MSA") markets.[1]

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[1]The Thomases established by sworn affidavits provided to the FCC that they had no expectation or reason to believe that Advanced would participate in or file any applications for cellular authorizations for any markets other than the MSAs for which it actually applied. Milton Vaughn, as Advanced's managing partner, corroborated the Thomases'

Subsequently, in December of 1986, without the Thomases' knowledge, Milton Vaughn formed Rubana, another Alabama general partnership. In June of 1988, without seeking the consent of either Jack or Dennis Thomas and without their knowledge of his intended actions, Milton Vaughn executed Rubana's partnership agreement for Advanced in his capacity as Advanced's managing partner, thereby attempting to cause Advanced to become a Rubana partner. However, the Thomases and others in early 1988, before Milton Vaughn executed Rubana's partnership agreement on behalf of Advanced, had formed Progressive Cellular III B-3, Petitioner herein, as a general partnership intended to file cellular applications with the FCC for

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statements by sworn affidavit provided to the FCC.

various RSA markets.

Thereafter, in October of 1988, still without the Thomases being aware of Milton Vaughn's prior actions with respect to Advanced, Petitioner filed its application with the FCC for the Oklahoma 4-Nowata RSA non-wireline cellular authorization. Rubana also filed its application for the Oklahoma 4-Nowata RSA authorization. Rubana's application listed Advanced as one of its partners, and Jack and Dennis Thomas were listed in the application as Advanced partners. Because the Thomases were properly listed in Petitioner's application and were also, without their authorization or knowledge, listed in Rubana's application, the FCC determined that Petitioner had violated FCC Rule §22.921(b), which prohibited any person from having an ownership interest in more

than one non-wireline cellular application per RSA market, and dismissed Petitioner's application.

When Milton Vaughn executed Rubana's partnership agreement as Advanced's managing partner, Advanced was the owner of minority (i.e., non-controlling) interests in various MSA cellular authorizations as a result of Advanced's participation several years previously in pre-lottery alliance agreements with other applicants for those MSA markets.[2]

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[2]Under the FCC's rules governing applicants for cellular authorizations in the MSA markets, pre-lottery alliances with other applicants for a given MSA were permissible, so long as the non lottery-winning applicants were limited by agreement to less than a one-percent ownership interest in the cellular authorization granted for that MSA. Advanced had joined various pre-lottery alliances for the MSA markets for which it filed cellular applications and, as a consequence of another alliance member receiving a license for certain of those MSA markets, Advanced received a less than

Advanced's partnership agreement, however, at Section 12 contained the following provision divesting its managing partner (Milton Vaughn) from independent decision-making authority once the partnership had any interests in cellular authorizations:

> The managing partner shall on his own authority attend to the day-to-day business affairs of the partnership. However, in the event a license is granted to the partnership or in the event the partnership is in alliance with any other entity in which a license is granted, all partners shall have an equal right to vote on how the partnership business shall proceed thereafter.

Thus, in June of 1988 when Milton Vaughn

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one-percent ownership interest in each of the licenses granted.

executed Rubana's partnership agreement on behalf of Advanced he had no authority under Advanced's partnership agreement to attend independently to the partnership's business affairs. Because Advanced was and had been for several years in alliances with various other entities that held cellular licenses in MSA markets, Milton Vaughn's proposed action with respect to Advanced was to be voted on by all Advanced partners under Section 12 of the partnership agreement as a precondition to the validity of that action.

Milton Vaughn contacted most of Advanced's partners before he listed Advanced as a Rubana partner, and all such partners contacted consented to his proposed action; however, he did not contact Jack or Dennis Thomas and he

obtained neither their consent nor their vote on the issue of whether Advanced should become a Rubana partner. Because the Thomases had no opportunity to vote on the issue of Advanced's proposed joinder as a Rubana partner, Mr. Vaughn exceeded his authority under Section 12 of Advanced's partnership agreement by attempting to cause Advanced to become a Rubana partner.

II. THE FCC'S REFUSAL TO CONSIDER LEGAL ARGUMENTATION AND EVIDENCE PRESENTED BY PETITIONER CONSTITUTED A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The FCC's determination that Petitioner had violated the "one ownership interest per market" provisions of Rule §22.921(b) was plainly based upon its conclusion that Jack and Dennis Thomas had ownership interests in both Petitioner's and Rubana's application. See App. at

13a-15a. In turn, the FCC's conclusion that Jack and Dennis Thomas had an ownership interest in Rubana's application is valid only if Advanced legally was made a Rubana partner by Milton Vaughn's action. The FCC's inquiry, as a matter of fundamental due process under law, should have been directed toward determining whether Milton Vaughn's action was sufficient under governing state law to cause Advanced to become a Rubana partner.

Petitioner demonstrated to the FCC that Rubana had actual knowledge of the restrictions on Milton Vaughn's authority imposed by Section 12 of Advanced's partnership agreement. Petitioner also demonstrated to the FCC, in light of the evidence and facts presented in this case (none of which have been disputed by the FCC), that, under §§10-8-49(a) and (d) of

the Alabama Partnership Act[3] and decisions of the Alabama Supreme Court, Milton Vaughn's execution of Rubana's partnership agreement on behalf of Advanced was legally insufficient to cause Advanced to become a Rubana partner.

However, the FCC refused to consider legal argumentation based on the evidence and the undisputed facts presented by Petitioner in support of its position, i.e., that Advanced legally was never made a Rubana partner, that the Thomases thus never had any ownership interest in Rubana, and that no rule violation occurred. Instead, the FCC, reiterating the FCC's Mobile Services Division's

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[3]App. at 19a-21a. Both Advanced and Rubana are Alabama partnerships; their partnership agreements specify that they are to be construed and governed in all respects by the laws of the State of Alabama.

Memorandum Opinion and Order initially dismissing Petitioner's application, stated that:

> ... because the Thomases were partners in Advanced, and Advanced was a partner in Rubana, Advanced's actions bound the Thomases through the Rubana filing.

App. at 14a. The FCC presumed that the mere listing of Advanced as a Rubana partner by Milton Vaughn was sufficient to cause Advanced to be legally a Rubana partner and to vest the Thomases with impermissible ownership interests in Rubana's application. The FCC reached this conclusion of law without applying or even addressing fundamental principles of Alabama partnership law governing the conditions under which a general partner's actions are insufficient to bind a

partnership to a proposed course of action. Simply put, although Petitioner showed that Advanced was never legally made a Rubana partner and that the Thomases had no ownership interest in Rubana, the FCC refused to consider those showings and determined, despite all evidence to the contrary, that Petitioner had violated the rule prohibiting any party to an RSA application from having an ownership interest in more than one application per market.

The FCC has not disputed Petitioner's assertions that it refused to consider legal arguments and evidence offered to show that Petitioner did not violate the FCC's rules. Instead, on appeal to the court of appeals, the FCC advanced the interests of administrative efficiency as the overarching rationale for its refusal

to address or even consider Petitioner's legal analysis as applied to the facts at hand. While acknowledging that Petitioner's claim raised difficult, contentious issues under state law, the FCC asserted that the large number of applications received for non-wireline cellular authorizations precluded it from an "ad hoc" analysis of the sort demanded by Petitioner. Thus, the FCC chose to sacrifice legal analysis and reasoned deliberation for the sake of administrative expediency, with a predictably unlawful result.

The court of appeals, by its Judgment filed February 2, 1993, affirmed the FCC's decision to dismiss Petitioner's application. The court, without explanation or analysis, deferred to the FCC's threshold presumption that

Petitioner's application was "flawed" and that Petitioner had violated the FCC's rules:

> ... the FCC did not have a duty to investigate the reasons for the flawed application, or grant a waiver simply because the violation of the rule was unintentional or not the fault of the appellant.

App. at 3a. The court gave no independent rationale for its conclusion that Petitioner's application was flawed and that Petitioner had violated the FCC's rule. It also failed to address Petitioner's argument that the FCC had a duty to consider evidence, facts and governing law demonstrating that Petitioner had not violated the FCC's rule.

The FCC's actions, as endorsed by the

court of appeals, run counter to the well established principles governing actions by a federal administrative agency. This Court, in Kessler v. Strecker, 307 U.S. 22 (1939), in addressing the essential elements of a valid administrative hearing, stated:

> If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside.

307 U.S. at 34. Similarly, in Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943), this Court, in

addressing the permissible scope of judicial review of agency action, stated:

> ... if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an Order may not stand if the agency has misconceived the law.

318 U.S. at 94. A fortiori, if an error of law by an administrative agency is sufficient to require a reversal of the agency's action flowing from that error, then a failure of the administrative agency to even apply underlying principles of law to the facts presented must also require reversal of the agency's action.

In the present proceeding, the FCC erred in its interpretation of the legal consequences of Milton Vaughn's actions concerning Advanced and the Thomases. It

also erred by refusing to consider and address arguments and analyses presented by Petitioner under Alabama partnership law intended to establish that Mr. Vaughn's actions were insufficient legally to cause Advanced to become a Rubana partner or to vest the Thomases with any ownership interest in Rubana's application. Such error by the FCC constitutes such arbitrary and capricious action as to deny Petitioner its constitutional right to due process of law. See, e.g., New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917); see also Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937): "The whole scheme of the administrative proceeding presupposes hearing and determination in accordance with the demands of due process."

III. THE FCC HAS VIOLATED ESTABLISHED STANDARDS GOVERNING AN AGENCY'S ACTIONS.

The FCC's refusal to consider the evidence presented to it also violates the substantial evidence standard governing a federal administrative agency's actions. In Pierce v. Underwood, 487 U.S. 552 (1988), this Court in addressing an issue involving, among other things, the reasonableness of a cap on attorneys' fee awards under the Equal Access to Justice Act stated:

> Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of "substantial evidence" set forth in the Administrative Procedure Act... . That phrase does not mean a large or considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as

> adequate to support a conclusion. [Citation omitted.]"

487 U.S. at 565. Previously, in United States v. First City National Bank, 386 U.S. 361 (1967), this Court stated that the "conventional standard" for judicial review of an administrative action is "whether the agency's action is supported by substantial evidence." Addressing further the substantial evidence standard, this Court stated that:

> ... it is the agency's function to determine whether the law has been violated, while it is the court's function to ascertain whether, absent error in statutory construction, the agency's action has substantial support in the evidence.

Id. See also Motor Vehicle Manufacturers Association of the United States, Inc. v.

State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983):

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43. Accord, Arkansas v. Oklahoma, 503 U.S. _____, 112 S Ct 1046 (1992): "... an agency ruling is 'arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem.'" [Second

ellipsis included in original.]

The FCC failed to consider an "important aspect of the problem," i.e., whether, in light of the operative limitations on Milton Vaughn's authority as Advanced's managing partner, his actions were sufficient under Alabama partnership law to cause Advanced to be deemed legally a Rubana partner. Instead, the FCC chose to base its dismissal of Petitioner's application on its unsupported conclusions that Advanced was a Rubana partner and that the Thomases had a legal ownership interest in Rubana's application, and disregarded all contrary evidence and legal argumentation. Its actions were thus not supported by substantial evidence. Under the well established standard for judicial review of agency action, the court of appeals

should have remanded this case to the FCC to reconsider its action in light of all relevant evidence adduced.

IV. THE COURT OF APPEALS HAS FAILED TO ENFORCE ITS POLICIES GOVERNING ACTIONS OF ADMINISTRATIVE AGENCIES.

In this proceeding the court of appeals deviated from its previously established policies as stated in Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938), cert. denied, 305 U.S. 613 (1938). In addressing the criterion under the Communications Act of 1934, as amended, governing the FCC's grant or denial of a communications facility construction permit, the court of appeals in Saginaw stated that:

> The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided

> by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily and from extralegal considerations ... . The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law.

96 F.2d at 559. The court of appeals, in addressing the sufficiency of broadly stated general findings of fact, stated that:

> We now rule that findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in the terms

> of the statutory criterion are inferred.

96 F.2d at 560. The Saginaw court further stated that:

> ... a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow.

96 F.2d at 561. See also Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973):

> ... this Court has relied on the "simple but fundamental rule of administrative law," [citation omitted], that the agency must set

> forth clearly the grounds on which it acted.

412 U.S. at 807. Contrary to the Saginaw court's requirements, the FCC did not set forth the legal basis for its determinations that Advanced was a Rubana partner and that the Thomases had an impermissible ownership interest in Rubana's application. It leaped to those ultimate findings without proper analysis or consideration of the facts and evidence before it and without even attempting to apply relevant law to such facts and evidence.

The court of appeals perpetrated the FCC's error in its stated conclusion, without supporting evidence or rationale, that Petitioner's application was "flawed." App. at 3a. That conclusion was, of course, the ultimate finding of

fact on which Petitioner's appeal to the court of appeals was principally based. However, absent findings of the basic facts underlying that ultimate conclusion, supported by substantial evidence and law, no valid determination has been made that Petitioner's application was flawed or that it violated the FCC's rules.

V. THE FCC MISCONSTRUED PETITIONER'S ARGUMENTS AND ADVANCED'S PARTNERSHIP AGREEMENT.

Even to the extent that the FCC attempted a superficial analysis of Advanced's partnership agreement, it misstated and misconstrued the nature of Petitioner's arguments and the plain language of Advanced's partnership agreement. For example, the FCC asserted that "...the managing partner's exercise of his authority does not require the unanimous consent of the remaining

partners, as claimed by Progressive [Petitioner here]." App. at 16a and 17a. Petitioner never suggested that unanimity was required, but it instead asserted that, under Section 12 of Advanced's partnership agreement, the opportunity must be given to all Advanced partners to cast their votes for or against a proposed partnership action.

More significantly, the FCC misstated the plain language contained in Advanced's partnership agreement at Section 12, which limited Milton Vaughn's authority as managing partner once Advanced was in an alliance with any other licensed entity. The FCC stated that:

> ...once the managing partner procures a license his function as license procurement agent ceases, and the partnership as a whole will decide

> how and what business decisions are to be made in order to construct and operate the facilities that will utilize the newly acquired license. Meanwhile the managing partner would continue coordinating the partnership's original business of procuring cellular telephone licenses.

App. at 17a. The FCC thus posited that the limitations imposed on Advanced's managing partner's authority applied solely to business decisions relating to any newly acquired license, but that the managing partner could continue independently to exercise his decisional authority for all other aspects of the partnership's business.

The FCC's position is contrary to the plain language of Section 12 of Advanced's

partnership agreement. Section 12 divested Advanced's managing partner of independent decisional authority for "the partnership business" once Advanced received a license or when a license was granted to any other entity with which Advanced had joined in an alliance. Supra at 13. The limitation on the managing partner's authority was not narrowly drawn, and it was not, by any reading of Advanced's partnership agreement, restricted only to actions with respect to "the newly acquired license," as stated by the FCC. App. at 17a.

To the extent that the FCC's dismissal of Petitioner's application depended upon its erroneous reading of the Section 12 limitations, such dismissal was unfounded and invalid. See SEC v. Chenery Corp., supra:

> ...an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

318 U.S. at 95. See also Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990), where this Court, quoting, with approval, SEC v. Chenery Corp., stated that:

> ...it is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself.

495 U.S. at 651, 652. It should be equally "elementary" that, in light of the

FCC's erroneous reading of the Section 12 limitations, it erred in dismissing Petitioner's application and the court of appeals should have remanded this cause for action consistent with a correct reading of Advanced's partnership agreement.

CONCLUSION

The FCC's actions here with respect to Petitioner's application, as ratified by the court of appeals, have so far departed from the accepted and usual course of quasi-judicial proceedings as to call for an exercise of this Court's supervisory power. Moreover, the issues presented herein by Petitioner raise an important question concerning the extent to which a Federal administrative agency, in the interest of administrative efficiency and expediency, may permissibly

refuse to consider legal arguments and evidence intended to establish that the agency's rules have not been violated. For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Douglas W. Harold, Jr.
5413 Main Street
Stephens City, Virginia 22655
(703) 869-0040

Counsel of Record and
Attorney for Petitioner

July, 1993